APHIS Trade Support Team

Technical Trade Report

Updates on Key Trade Policy Issues Affecting APHIS

May 1999

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Letter from the Director

1999 is turning into a pivotal year for a number of high profile trade policy issues. For example, we are on the eve of embarking on another round of global agricultural trade negotiations scheduled to begin in January 2000. Hemispheric negotiations, under the Free Trade Area of the Americas (FTAA), is also picking-up steam. In addition to these upcoming negotiations we are facing the increasingly serious challenge of trying to meet other countries concerns and attitudes about trade in biotechnology--a very serious issue for American agriculture given our increasing utilization of this gene technology. Finally, we have usual the assortment of market access problems due to other countries , sometimes questionable, sanitary and phytosanitary (SPS) requirements.

The Trade Support Team (TST) has played an important role for APHIS in terms of ensuring agency input into current discussions within the Department and U.S. Government related to these upcoming global and regional negotiations. We are also working closely with APHIS staffs to formulate an Agency position regarding international frameworks for biotechnology products. I am very proud of my staff efforts in coordinating, analyzing, and advancing APHIS regulatory philosophy and SPS goals in the context of these broad agricultural trade policy discussions.

Also significant this year was the conclusion to the triennial review of the WTO SPS Agreement. Under the SPS Agreement, members were required to undertake a 3-year review of the Agreement. This review, underway over the past year and half, was finally concluded at a March 1999 meeting of the SPS Committee without any country proposing textual changes the Agreement. Instead, countries focused their discussions and recommendations on ways of improving implementation of the existing provisions (e.g., notification, regionalization, and equivalence). It is hoped that this general attitude of noninterest in reopening the SPS Agreement will prevail once countries enter into the next round of WTO negotiations in agriculture set to begin in January 2000. At least this is the preferred position of USDA and the consensus view of the U.S. agricultural industry. The concern is that any effort to open one portion of the text for improvements could lead countries to demand changes in other parts, resulting in an overall weakening of the disciplines contained in the Agreement.

In the biotech area, APHIS is making a strong case that the existing science-based framework, embodied by the SPS Agreement as well as in APHIS regulatory approach, used to assess the safety of convention products is a sound and consistent framework to use in assessing the risks of products derived from new technologies. For this reason, we believe that the SPS Agreement already provides the rules for disciplining countries use of health-related measures for biotech products. However, it is unclear at this time whether other countries share the view that the scope of the SPS Agreement covers biotechnology products.

Explicit reference to biotech products was not made during the Uruguay Round negotiations on SPS, largely because it was not, at that time, an active or problematic issue. Today it is. The question remains -- how should biotechnology be, if at all, introduced and addressed in the context of the next round of WTO agricultural trade negotiations? A great deal of discussion and debate in now underway in identifying an approach for creating a more stable and predictable environment for trade in biotech commodities.

In April, the Interim Commission for Phytosanitary Measures (ICPM), the governing body of the International Plant Protection Convention (IPPC), established a working group at its November 1998 meeting to develop rules and procedures for operating the IPPC dispute settlement provisions. While the IPPC dispute settlement provisions are non-binding (as indicated in the Convention itself), the procedure could help forewarn countries to measures which may be inconsistent with the WTO SPS Agreement and vulnerable to WTO challenge. In certain cases, the IPPC could also provide an alternative venue for resolving phytosanitary disputes at less cost and embarrassment than the dispute resolution process at the WTO. The working group met its goal of drafting a report which describes general principles as well as a step-by-step process for operating the IPPC dispute settlement procedure. This report will be forwarded to the ICPM for its review and its annual meeting scheduled for October 1999.

I would like to close by noting some important goals we hope to reach in the immediate months ahead. First, our annual SPS Accomplishment Report is near completion. We hope to publish the FY 1998 SPS Accomplishment Report by late May. In accordance with the Government Performance and Results Act (GPRA), this data will help illustrate and document APHIS performance in resolving SPS issues which affect U.S. exports. Second, the Agency is working on a new Web Page will allow interested individuals to review and comment on international standards under development at the IPPC. Once this Web Page is established it will be accessible from the APHIS home page. We think this will be a major step forward in promoting our standard setting activities to interested parties both domestic and foreign. Third, we continue trying to meet the international interest and demand for risk assessment information and training. To this end, we are completing a series of learning materials on risk assessment. We hope to eventually make this training material available on the Web in an interactive format.

Last, I want to welcome several new people who have recently assumed some key positions in APHIS. These include: Dr. Alfonso Torres as the new Deputy Administrator for Veterinary Services; Dr. Richard Dunkle as the new Deputy Administrator for Plant Protection and Quarantine; and Alan Green as the new Director of the APHIS Phytosanitary Issue Management team. I hardly know these individuals, but I am already impressed by the vibrant ideas and intense interest they have shown, particularly with regard to the complex issues risk assessment, trade, and APHIS organizational design. TST warmly welcomes these new folks and look

forward to jointly advancing the Agency s international agenda.

John Greifer

Director,

Managing Sanitary and Phytosanitary issues under the Free Trade Area of the Americas

Introduction:

The Free Trade Area of the Americas Negotiating Group on Agriculture (NGA) is responsible for the negotiation of tariffs and non-tariff measures, export subsidies and other trade distorting practices affecting agricultural products in the hemisphere, and sanitary and phytosanitary measures.

May 24-26 the NGA will meet for the fourth time in Miami to focus on sanitary and phytosanitary issues affecting trade in the Western Hemisphere. The current debate centers on how SPS issues should be governed under the legal framework of the Free Trade Area of the Americas (FTAA), with some countries wishing to go so far as to establish an FTAA SPS Committee to enforce compliance with existing WTO SPS principles and any additional FTAA standards that may apply as a result of future negotiations. While there is general consensus in the NGA that the WTO SPS Agreement should serve as the basis of any new FTAA SPS standards, some countries, including the United States, will be offering suggestions for enhancing the understanding of WTO SPS principles, especially those of transparency, equivalency and regionalization, without proposing any amendments to the existing WTO SPS Agreement that would apply exclusively to FTAA members.

Background:

In 1994 in Miami, heads of state in the Western Hemisphere agreed to build a free trade area by the year 2005, and to achieve substantial progress toward this goal by the year 2000. Formal FTAA negotiations were launched April 1998 in Santiago, Chile.

Recognizing the impact SPS measures can have on agricultural trade, FTAA negotiators are seeking to provide assurances that, at a minimum, existing WTO SPS principles are implemented effectively within the region. Where the FTAA may enhance these principles is through an elaboration of rights and obligations implicit in the WTO SPS Agreeement, and, possibly, through the establishment of a hemispheric SPS Committee to help arbitrate SPS disputes. In sum, any elaboration of principles under the FTAA will aim to achieve the same objectives of the WTO SPS Agreement: namely, to prevent the use of animal and plant health import measures as non-tariff, protectionist barriers.

In 1998, the Western Hemisphere served as a $21.2 billion market for U.S. agriculture exports, and were a source of $34.6 billion of U.S. imports. In addition, this region is targeted by USDA as a growing market for U.S. agriculture products. FTAA negotations to bring further disciplines to SPS measures will help to facilitate trade within this important market without compromising U.S. measures to

safeguard human, animal and plant health.

Fourth Meeting of the NGA:

The fourth meeting of the NGA is dedicated to addressing the issues of SPS measures and their impact on trade in the region. A general concensus has emerged within the hemisphere that the application of SPS measures should be governed by a trading system based upon enhanced rules and sound science with the aim of preventing the misuse of SPS measures as disguised restrictions on trade, while safeguarding each country's right to take measures necessary to protect human, animal, or plant life or health. This objective may best be served through regional initiatives to accelerate implementation of certain provisions of the WTO SPS Agreement, specifically those of transparency, risk assessment, equivalency, recognition of area freedom, harmonization, technical assistance, dispute settlement, and contol, inspection and approval procedures. Currently, the U.S. position does not support the need for a negotiation of a separate FTAA SPS agreement that would be applied exclusively within the region. The rights and obligations contained in the WTO SPS Agreement achieve a reasonable balance between providing contries the ability to protect domestic health and safety while ensuring that SPS measures are not used as arbitrary or unjustifiable trade barriers.

With respect to the results of the three-year review of the WTO SPS Agreement, several implementation and operational problems were identified; however, nothing emerged from the review that suggests that the agreement should be amended. Rather, it was suggested that member countries should strive for full implementation of the existing SPS principles.

It is in the area of implementation that the U.S. supports the development of regional guidelines based on the work of the international standards-setting bodies. These bodies, and their regional affiliates, provide the appropriate forum for developing the operational guidelines for improving the technical, SPS impediments to trade. These bodies include the Codex Alimentarius (food safety), the International Plant Protection Convention (plant health), and its regional organizations, and the Office of Epizootics (OIE).

An important issue still pending within the negotiations is the organzational structure under which the SPS discussions should be carried out. Several organizational options exist including a sub-committee or ad-hoc working group. However, it has been the U.S. position, which is shared by several members, that the scope of discussions should be determined by the NGA as a whole before agreeing to the establishment of a separate, SPS forum.

Conclusion:

Many FTAA member countries have identified the unjustified use of SPS measures as real barriers to trade in the hemisphere. Therefore, improving expediency and transparency in such areas as carrying out risk asssessments; making equivalency determinations; recognizing pest free areas; and notifying SPS rule changes could help reduce impediments to market access for low risk commodities and clarify the mitigative conditions of the entry

of higher risk commodities. Establishing such a set of guidelines for implementing the existing WTO SPS principles in the region, combined, possibly, with a regional dispute settlement mechanism, should result in a reduction in the abuse of SPS measures as protectionist barriers. Moreover, such guidelines could help reduce the ambiguity of what serves as a legimate SPS measure, thereby offering a stronger defense for importing countries in maintaining their appropriate levels of protection. An elaboration of SPS rules based on sound scientific principles and subject to some type of procedural guidelines could, in the long run, significantly reduce trade irritants by providing for more stability and homogeneity in trade within the Western Hemisphere.

The 1998 Accomplishments Report

The third annual USDA SPS Accomplishments Report, covering Fiscal 1998, will shortly be published. The Report highlights USDA accomplishments in resolving trade issues related to animal and plant health measures. In fiscal 1998, 43 issues were resolved, allowing over $398 million worth of agricultural trade to take place.

The Report examines accomplishments related to both U.S. exports and imports. As was the case in both fiscal 1996 and 1997, export accomplishments make up most of the total, and account for most of the value. In fiscal 1998, 35 export issues were resolved, involving trade in $375 million worth of U.S. animals and animal products, grains, fruits and vegetables, seed, and other commodities.

Export Markets for U.S. Products Opened, Expanded, Safeguarded

Over half the value of the export accomplishments resulted from market retention, or safeguarding an existing export market in the face by some action by the importing country. Export markets for U.S. poultrymeat in China, U.S. rice in Nicaragua, and U.S. cattle in Egypt were all preserved in fiscal 1998.

Several export commodities benefited from market expansion in fiscal 1998, including lemons from Arizona, Cherries from Idaho and California, and Christmas trees from Pennsylvania. Market expansion refers to increasing existing market access by expanding the areas eligible to ship products, or reducing import requirements that hamper trade.

Some important new or renewed market access was also obtained in fiscal 1998. For example, Chile agreed to accept U.S. wheat, after long technical consultations and a visit by Chilean phytosanitary authorities to review the U.S. karnal bunt program. Market access accounted for over $1 million in agricultural exports in fiscal 1998.

Import Accomplishments

The SPS Accomplishments Report also considers new market access or expanded market access granted by the United States for imported products. Nine import accomplishments, totaling nearly $24 million in trade, are included in the Fiscal 1998 Report. These include imports of papayas from Brazil, tomatoes from Morocco, Western Sahara, Chile, Spain, France, and Palestine, and dry-cured pork products world-wide.

USDA Trade Facilitation Efforts

The Fiscal 1998 SPS Accomplishments Report also examined USDA efforts to facilitate trade on the ground in importing countries. Often, shipments of U.S. agricultural products encounter difficulties entering an importing country. This may be due to certification problems, pest interception, or simple misunderstandings, but the exporter and/or importer face substantial financial losses if the shipment is rejected or must be held for some time.

APHIS and FAS attaches in foreign countries are actively involved in resolving these kinds of problems, and obtaining the release of shipments. The Report details just a few examples of this kind of trade facilitation, which is difficult to capture in the trade estimates.

Comparisons with the Fiscal 1997 Report

A smaller number of SPS issues was resolved in fiscal 1998, compared to the previous year, when a total of 77 export issues and 23 import issues were resolved. The value of export accomplishments was significantly lower in fiscal 1998 ($375 million compared with nearly $2.2 billion in fiscal 1997), while the value of import accomplishments was greater ($24 million compared with $9 million).

It is important to keep in mind that resolution of SPS issues is a continuous effort. Often, disputes are not resolved "once-and-for-all", and new problems arise all the time. The benefits of SPS accomplishments and trade facilitation efforts, however, grow over time. Table 3 shows how the value of some new markets opened in fiscal 1997 increased in fiscal 1998.

It is impossible to predict how many trade issues might be resolved in any given year, or how much time will be required to resolve any given issue. Technical discussions may continue for a long period of time: much depends on the receptiveness of foreign counterparts, and on the time it takes to compile or obtain appropriate scientific information.

Using the World Trade Organization s Dispute Settlement Process: The US-Japan Varietal Testing Case

The so-called Varietal Testing Case against Japan was the first phytosanitary (i.e., plant health) issue to be considered by a dispute settlement panel in the World Trade Organization (WTO). In this particular case, the issue at hand was Japan s imposition of an absolute import ban on all commodities that it asserted were potential hosts to a specific quarantine pest, the codling moth. The commodities of most concern to the United States in this case were apples, cherries, nectarines and walnuts.

Since the early 1970's, the United States has been engaged in a rigorous research effort to export various fruit commodities to Japan. While no overall costs figures are available for the full research effort, the testing of those commodities for which the United States received permission to import is estimated to be approximately $12 to $14 million. (USDA, ARS, 1998). To have the ban lifted on a new variety, the testing procedure included: (i) an initial test to estimate the basic dose-response of the pest in question, in or on the variety in question; (ii) data review by a

MAFF official; and, (iii) a large-scale test consisting of a total of 30,000 insects at 10,000 insects in each of three successive individual trials. If successful, only then was an on-site confirmatory test conducted in the presence of MAFF staff. Resulting data was again reviewed by a MAFF official, and following confirmation of efficacy, a public hearing in Japan was required on lifting the ban for the particular variety. The United States noted that where there was an accepted quarantine treatment for another variety of the same product, Japan allowed for a comparison dose-mortality test. The same treatment was tested simultaneously on the new and old variety and the results were compared to ascertain whether there were differences in response of the insects. The results of this test were reviewed by Japanese officials. If there were no differences, then an on-site confirmatory test was required with 10,000 insects generally divided into three replications, in the presence of a MAFF official. This process was rarely employed, however, because it was possible that the old variety was no longer cultivated or the harvest time for one variety did not coincide with another.

An effective quarantine treatment for cherries was developed by the US in 1976, for walnuts in 1984, for nectarines and apples in 1986. Despite development of an effective quarantine treatment for US cherries in 1976, the Rainier variety of cherries was not accepted for import into Japan until 1992, a full sixteen years after the development of a treatment for cherries. Similar examples exist with respect to apples and nectarines. In 1982, the US and Japan held their first bilateral talks in which the US inquired whether Japan would accept Washington State apples. Japan refused, citing its ban on codling moth. Twelve rounds of bilateral talks (encompassing apples specifically, and varietal testing as it is applied to other commodities such as nectarines and cherries) were held with no successful resolution. Finally, in 1994, eight years after the United States had developed an effective treatment for apples, Japan permitted entry of US Golden Delicious and Red Delicious apples.

As a result of this import prohibition, Japan had succeeded in blocking access to its market for US varieties that compete with a number of domestically produced varieties of the same commodity, in particular, the Fuji variety of apple.

Several agencies worked together in the effort to bring the case against Japan to a successful conclusion. Leading the technical effort were the US Department of Agriculture s Agricultural Research Service (ARS) and the Animal and Plant Health Inspection Service (APHIS). While the effort to eliminate varietal testing by the Japanese had been ongoing for several years through the series of bilateral technical talks between APHIS and Japan s Ministry of Agriculture Forestry and Fisheries, it was only until January of 1997 that an Agriculture Department interagency group came to a consensus on bringing the issue forward to the WTO Dispute Settlement Process pending the outcome of bilateral technical talks to be held in March 1997. Two people were specifically given the task of managing the development and prosecution of the case within APHIS. One was the Director for Asia of the Phytosanitary Issues Management Team (PIMT) of

APHIS Plant Protection and Quarantine, and the other was the trade policy analyst of the APHIS Trade Support Team. Also playing a significant role in developing the technical case was the Senior Scientist National Program Leader for Post-Harvest Entomology at ARS.

The starting point for the prosecution of the case can generally be considered to be the bilaterals held in Hilo, Hawaii, on March 4-6, 1997. This is because these bilaterals marked the first time that an actual threat of taking Japan to the WTO was actually voiced, and documentation of the effort began. The technical team which traveled to the Hawaii included both APHIS personnel who worked on the case as well the ARS senior scientist. Both APHIS and ARS personnel were in attendance at this meeting in which the Japanese were warned that unless the issue could be resolved within that particular forum, the topic would be elevated to a higher level, meaning the WTO dispute settlement process. The issue was not resolved in Hawaii.

Subsequently, after internal U.S. Department of Agriculture negotiations with concerned agencies, and external discussions with the Office of the United States Trade Representative (USTR) and industry representatives, a decision was made to move the issue to the WTO Dispute Resolution process. After the US made a request to the Dispute Settlement Body for formal consultations on April 7, 1997, consultations with Japan were held on June 5, 1997, in Geneva, Switzerland. A US interagency team including the APHIS and ARS personnel participated in those consultations. Following the failure of those consultations to achieve any positive results, it was apparent that Japan would be unwilling to stop its practice of varietal testing absent a decision by a Dispute Settlement Body Panel. The interagency team working on the issue met in August, 1997, and determined that a dispute resolution panel was needed in order to resolve the problem. The United States requested and was granted a panel in November 1997.

Much of the work which followed the bilaterals and the consultations focused on developing the scientific argument for the eventual case. Research of relevant supporting scientific articles was conducted, and questions were formulated to be asked of the Japanese during the consultations in June. During the period between the bilaterals and the consultations which took place in June, the Japanese sent a delegation to Washington to try and reach and agreement in order to stave off the WTO process, but these negotiations, held at the end of March, ended without resolution.

Once the decision to prosecute the case through the dispute settlement process of the WTO was made, the technical team and the legal team began coordination of efforts to produce the opening legal brief for presentation to the Panel. This effort required several meetings and much discussion as the technical personnel and legal personnel came to terms with the intricacies of formulating a coherent and winnable argument.

The initial Panel meeting took place on 2 and 3 April 1998. During the initial panel hearing, both the US and Japan presented their opening statements, after which Hungary, Brazil and the European

Union participated as Third Parties and presented statements of their own. The Panel, after hearing the various presentations, determined that an additional hearing was necessary, specifically in order to allow for the inclusion of scientific experts in the process, because of the highly technical nature of the case. A list of several candidates was presented to both Japan and the United States for their review and recommendation.

The review of the initial panel hearing took place and a great deal of effort was then spent by the interagency team in preparing not only the second brief for the second panel hearing, but for preparation of questions to both the Japanese, and the panel of experts, as well as answers to questions posed by Japan and the Panel itself. After the responses to those questions were provided, another review took place which focused on the answers to the questions the US asked and preparing statements for the second panel hearing.

The Panel consulted the scientific and technical experts and met with them on 23 June 1998. The Panel held a second meeting with the parties on 24 June 1998. The Panel issued its interim report on 6 August 1998. On 21 September 1998, upon request by Japan, an interim review meeting was held with the parties, this meeting, held in Geneva, Switzerland, was attended only by the legal members of the US interagency team. The Final Report was circulated to the parties on 6 October 1998 and was a clear victory for the United States. In its report, the Panel noted that Japan s varietal testing requirement was not supported by scientific evidence, was more trade restrictive than required and was non-transparent. Japan s regulation was therefore inconsistent with Articles 2.2, 5.6 and Annex B of the Agreement on Sanitary and Phytosanitary Measures.

The Japanese were obviously disappointed with the results of the Panel Process, and on November 24, 1998, Japan notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a notice of appeal with the Appellate Body.

Preparations for the appeals process begin almost as soon as the final panel hearing was completed. Because of the recent creation of the SPS legal process (the varietals case is only the third under the SPS Agreement of the WTO), it can be easily anticipated that a case will be appealed by one or more of the parties participating. Even the party considered to be the victor in the case may bring an appeal in order to clarify points of law with regard to the SPS Agreement. In the Varietal case, for example, the US appealed the Panel s ruling on Article 5.6 of the agreement in order to include quince, plums, pears and apricots in the ruling overturning the Japanese measure.

The legal preparations for the case and the appeal were handled by the attorneys responsible for the case at the Office of the United States Trade Representative and USDA s Office of the General Counsel. The scientific basis for the arguments of the US had been prepared for the original Panel hearing by APHIS and ARS on a cooperative basis, with any general points addressed by the entire United States team working on the case.

The key point to remember in the appeals process is that the purpose is to appeal the interpretation of the SPS law applied by the original Panel, and to redress what the complainant feels is an incorrect interpretation of that law.

The parties to the case each file an appellant brief, and any interested third party may submit a brief and participate in the Appeal hearing as well. All of the briefs and any official comments on the brief are made available for the participants to review in advance of the hearing. The lead attorney on the case requests comments from the team and then prepares the oral statement for delivery at the hearing.

The hearing itself took place (as had the original consultations and panel hearings) in the facilities of the WTO. The Appellate panel is made up of internationally recognized legal scholars, as opposed to the original panel, which generally is comprised of trade specialists. At the outset of the hearing, participants are reminded of the confidentiality of the proceedings, provided with the outline of what will take place during the hearing itself, and then are provided with the opportunity to make opening statements. The parties are informed that they should assume that the members of the panel have read all the documents pertaining to the matter at hand, and that they should not read anything into the questions posed by the panel. All participants are allowed the opportunity to make an opening statement, and questions addressed by the panelists may be directed to one of the parties, both of the appellants, or all of the parties present.

As noted above, the focus of the hearing is to render a decision based on interpretation of the law, not to find facts. The questions of the panelists were very specific, and followed a pattern which addressed each of the specific articles upon which decisions were made by the original panel. Several questions were addressed to Japan specifically, others to the US, while others were left open for comment by all parties.

The Dispute Settlement Body (DSB) Appeal Panel met on January 19, 1999 in Geneva to hear the appeals of Japan and the United States to the October 16, 1998 WTO DSB Panel report on Japan s varietal testing regime. This meeting was attended by the full US interagency team. On February 22, the Dispute Settlement Body published the decision of the Appellate Body with regard to this case. That result again was an overwhelming victory for the United States. The Appellate Body recommended that Japan bring its varietal testing requirement found in its Report, and in the Panel Report as modified by the Appellate Report, to be inconsistent with the SPS Agreement, into conformity with its obligations under that Agreement.

In its report to the WTO the Appellate Body:

a) upheld the Panel's finding that the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts is maintained without sufficient scientific evidence within the meaning of Article 2.2 of the SPS Agreement;

(b) upheld the Panel's finding that even if the varietal testing requirement were considered to be a provisional measure

adopted in accordance with the first sentence of Article 5.7, Japan has not fulfilled the requirements contained in the second sentence of Article 5.7 of the SPS Agreement;

(c) concluded that the Panel's consideration and weighing of the evidence in support of the claim of the United States that "testing by product" achieves Japan's appropriate level of protection relates to the Panel's assessment of the facts and, therefore, falls outside the scope of appellate review;

(d) concluded that, as it had reversed the finding of inconsistency under Article 5.6 of the SPS Agreement, there is no need to address the issue of the relationship between the Panel's finding of inconsistency under Article 2.2 of the SPS Agreement and its finding of inconsistency under Article 5.6;

(e) upheld the Panel's finding that the varietal testing requirement, as set out in the Experimental Guide, is a phytosanitary regulation within the meaning of paragraph 1 of Annex B of the SPS Agreement, and that Japan has acted inconsistently with this provision and Article 7 of the SPS Agreement;

(f) found that the varietal testing requirement as it applies to apricots, pears, plums and quince is not based on a risk assessment and, therefore, is inconsistent with Article 5.1 of the SPS Agreement;

(g) concluded that there was no need to address the issue of inconsistency with Article 8 and paragraph 1(c) of Annex C, of the SPS Agreement as it upheld the Panel's finding under Article 2.2;

(h) reversed the Panel's finding that it can be presumed that the "determination of sorption levels" is an alternative SPS measure which meets the three elements under Article 5.6 of the SPS Agreement, because this finding was reached in a manner inconsistent with the rules on burden of proof;

(i) concluded that the Panel did not err in law in failing to extend its finding of inconsistency with Article 2.2 to the varietal testing requirement as it applies to apricots, pears, plums and quince, and concludes that, as we have reversed the Panel's finding of inconsistency with Article 5.6, the issue of extending this finding is moot; and,

(j) concluded that the Panel did not abuse its discretion contrary to the requirements of Article 11 of the DSU.

The Panel completed its work within 30 days of the hearing. Following this, the DSB adopted the decision and it was then adopted by the parties to the dispute. At a DSB meeting held within 30 days of the date of the adoption of the Appellate Body report, Japan member informed the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. Article 21 of the Dispute Settlement Understanding of the WTO notes that If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The general rule in previous cases has been for the DSB to allow 15 months for implementation, an amount of time which has been arrived at through binding arbitration.

On April 26, the varietal case interagency virtual team, led by Assistant USTR James Murphy met with a large Japanese delegation for a discussion aimed at agreeing on a reasonable period of time for the implementation of the Appellate Body s ruling in the matter. For their part, the Japanese proposed an implementation period of between 17 and 20 months, which, if adhered to, would be the longest implementation period on record for a WTO case. The Japanese claimed that they required this extraordinary length of time for implementation because they not only had to scrap their current system but replace it with a new regulation. As a part of developing this new regulation they would have to conduct a new series of tests in an effort to come up with what they believed was a scientifically-based regulation.

In response, the US pointed out that the ruling in the varietal case did not require the drafting of a new regulation; it simply stated that the current practice must be stopped. In addition, the US further pointed out that the data which the Japanese were seeking from the new series of tests had already been provided to the Japanese from several sources on many additional varieties during the course of countries fulfilling the requirements of the previous varietal testing system. It was also pointed out that the proposed Japanese testing is in fact just another form of varietal testing.

The basic goal of the US team with regard to this meeting was to arrive at the reasonable period of time for implementation, rather than to resolve everything associated with the Appellate Body report. This would not have been possible in any case. What did happen in the end, however, was a tentative agreement, subject to further approval on both sides, to narrow the implementation period down to ten months. The next step with regard to the case is to establish what exactly is to be implemented. In its current configuration, the Japanese proposal of testing based on CxT values (concentration times time) would be a very difficult, if not impossible solution to the issue. The Japanese have proposed a technical meeting between US and Japanese scientists to discuss the technical parameters, etc. As of this writing, the substance and dates for this scientific exchange proposal are being negotiated.

When reviewing the details of prosecuting this case, it is important to consider the amount of time and effort which went into developing the arguments, and actually participating in the several meeting, consultations and panel hearings. Several individuals and agencies were involved in the case during the two and one-half years it has been ongoing.

For the purposes of this piece, special focus is directed on the time (in salary) of the two APHIS participants in the case and travel costs. Other costs were considered, such as phone calls, other APHIS personnel on the periphery who contributed to the case, but they were rejected in part, because some of the costs are fixed, and other would be too difficult to quantify.

It was generally agreed that the PPQ Director for Asia spent approximately 20 percent of his time from January 1997, through June 1999, in activities related to the varietal testing case. For the Trade

Support Team Asia Policy Analyst, approximately 25 percent of the time from January 1997 to June 1999 was spent on the case. When salary levels and grade are computed, the approximate monetary cost in salary terms for the two primary APHIS personnel who have been working on the case comes to approximately $82,000, or about the current annual salary of a GS-14 step 7.

Travel costs include four trips to Switzerland for the PPQ s Asia Director and three trips for the TST Policy analyst, at a combined cost of $20,300. An additional $5,000 should be added for the costs of the trips for these two personnel to the Hawaiian bilaterals in 1997, giving a total cost for travel associated with the case at $25, 300. When combined with above salary results, the total estimated costs associated with prosecuting the WTO case against Japan on its varietal testing measures comes to $107,300, or a little more than the current annual salary of a GS-15 step 9.

It is important to remember that costs not included above are those associated with the efforts of APHIS personnel who contributed their efforts along the way, but not as a central figures in the interagency process. These personnel include several technical specialists in APHIS PPQ and the APHIS Attach and Foreign Service Nationals in the US Embassy in Tokyo. Also, the vital technical contributions of Agricultural Research Service personnel are not included in the compilation of the amount.

The victory for the US in this case provides notice to Japan that it cannot and should not maintain unreasonable SPS measures against foreign imports in order to protect its own industry. It is also is a clear example that the WTO Dispute Settlement process works when a solid case is established and argued. It should also serve as a reminder to the US that we are not immune to being challenged in the WTO, and that we should ensure that our own house is in order with respect to SPS measures which we maintain for foreign commodities.

It is also important to note that the costs associated with pursuing cases within the WTO s Dispute Settlement process are time-consuming and high. Due to these factors, it is imperative that due consideration and effort be given to exhausting all possible bilateral efforts, as called for by the WTO SPS framework, to resolve any serious issues between trading partners. If, and only if, a responsible resolution is not worked out, should parties embark on the WTO Dispute Settlement Process.

Status of Chinese Long Horned Beetle Restrictions

On December 17, 1998, USDA s interim rule on solid wood packing material from China went into effect after a 90-day implementation period. Other countries have been closely following this rule due to similar problems. A regional standard with respect to wood dunnage was signed on November 3, 1998 by Canada, Mexico, and the U.S. Canada s new quarantine rule for the Asian Long-horned beetle went into effect January 4, 1999. Australia has had a solid wood packing material rule for sometime and the United Kingdom also

recently implemented a new quarantine regulation on solid wood packing material from China.

Initial reports from the field indicated that China s implementation activities regarding the emergency rule on solid wood packing material have been very successful. From January 1, 1999, through February 28, 1999, officials of the Animal and Plant Health Inspection Service (APHIS) conducted 8,839 inspections of shipments under the interim rule on solid wood packing material from China and Hong Kong. Out of this figure, only 734 shipments (or about 8% of all shipments) were inspected and found to be out of compliance with the rule. This means that there was an overall compliance rate of about 92% for all shipments inspected under the requirements of the interim rule on solid wood packing material from China and Hong Kong for the period ending February 28, 1999.

Of particular significance in these figures was the fact that there were 621 non-complaint shipments with no solid wood packing material (or about 7% of all shipments inspected) which may have indicated that there was some lingering misunderstanding among Chinese shippers that an exporter statement is required for shipments without any solid wood packing material. Only 113 non-compliant shipments (or about 1% of all shipments inspected) were shipments with solid wood packing material. Of the shipments out of compliance and containing solid wood packing material, only 54 (or .006% of the total shipments inspected) contained wood and had no treatment certificate. Even fewer shipments (34 or .003% of all shipments inspected) had an invalid/incorrect treatment or live insects.

The report for March was even more encouraging in that it indicated a 99% compliance rate for the Chinese. The two key problem areas were shipments arriving with wood and no treatment certificate, and shipments without an exporter statement indicating there is no solid wood packing material. These numbers were, however, very low. Improvement in this area from the February report can very obviously be attributed to continued Chinese efforts to inform exporters that a statement is needed even when no solid wood packing material is in the shipment. The number of shipments without an exporter statement indicating there is no solid wood packing material dropped from 621 in January and February to only 36 in March.

This exceptionally good rate of compliance by China is in no small part due to the excellent communication links that were established between APHIS officials and their counterparts in the Chinese Embassy and Hong Kong Consulate in Washington, as well as the APHIS Attache in Beijing, Mr. Dale Maki. In addition, the willingness of Chinese Inspection and Quarantine (CIQ) and Hong Kong s Agriculture and Fisheries Department to listen to the concerns of APHIS about the threat of quarantine pests from untreated solid wood packing material over the course of several meetings speaks well of CIQ s intention to further develop closer relationships with APHIS. Also important in this exceptionally good rate of compliance are the efforts of Chinese quarantine officials to get the word out to Chinese exporters on the requirements

of the regulation. All of these efforts will undoubtedly help to ease negotiations between the two sides on future issues as they arise.